PERAK CONSTRUCTION SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[TAX APPEAL NO: R2-14-6-2000]
22 MARCH 2001

REVENUE LAW: *Income tax - Stock-in-trade - Purchase of land - Land capitalised into accounts - Whether evidence that property not stock-in-trade - Land acquired by government - Whether constituted disposal in ordinary course of business - Gains thereof - Whether a trading profit - Whether assessable - Whether subject to income tax - Income Tax Act 1967, ss. 3, 24(1)(a), 29*

REVENUE LAW: *Income tax - Assessment - Year of assessment - Land acquisition - Award made in 1995 - Acquisition vide Form K made in 1997 - Correct year of assessment - Whether assessment year 1996 - Whether assessment year 1998 - Income Tax Act 1967, ss. 24(1)(a), 29 - Land Acquisition Act 1960, s. 22*

In 1975, the appellant purchased several pieces of land ('the subject lots') pursuant to a directors' resolution dated 21 June 1975. The resolution did not state whether the property was acquired for investment or development, or as stock-in-trade. Thereafter, the subject lots were left undeveloped by the appellant. In 1980, the appellant capitalised the subject lots at RM3.5 million, and had the capitalisation reflected in its annual accounts. On 12 October 1981, the government issued a notification that it intended to acquire the subject lots. In 1982, the appellant applied to the authorities to develop the subject lots as a residential and commercial complex, purportedly to enhance the value of the property in view of the impending acquisition by the government. The facts showed however that the appellant was not a housing developer, and nor was it dealing or trading in land or buildings. Consequently, having submitted the application to develop the subject lots, the appellant did nothing to further that objective, not even to sub-divide the said land. It was also evident that no development approval was given or obtained in respect of the subject lots.

In October 1995, the government, having since withdrawn the earlier notice, again gave notification to acquire the subject lots. Subsequently, in December 1995, the government awarded the appellant RM2,084,448.60 compensation, and in October 1997 acquired the subject lots.

The respondent alleged that the awarded sum of RM2,084,448.60 was subject to taxation, as the subject lots were purchased for development and therefore formed part of the appellant's stock-in-trade. This argument found favour with the learned special commissioners, who further held, by way of case stated herein, *inter alia*, that: (i) the appellant had other lands for development, and therefore the subject lots must be trading stock; (ii) the acquisition had given rise to a trading profit; and (ii) the status of the subject lots as stock-in-trade was not vitiated by the compulsory acquisition.

Dissatisfied, the appellant appealed. Before the learned judge, the primary issue that arose was whether the gains from the acquisition by the government of the subject lots herein were subject to income tax, and in any case, whether the special commissioners, in ruling the way they did, had misdirected themselves.

Held:

[1] Bearing in mind the decision in *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri*, it is clear that whether or not the subject lots herein were stock-in-trade would depend on whether it could be established that the appellants were at the material time trading or engaged in an adventure in the nature of trade. This is the key question. (p 503 e-f)

[2] The present case is a case of compulsory acquisition and, therefore, the disposal of the subject lots cannot be held as disposed of in the ordinary course of business. The appellant could not be said to be trading in the subject land, as the fact of the compulsory acquisition, not being a sale or commercial transaction, negatived any intention of trade. The special commissioners' conclusion that the 'subject land satisfied the definition of stock-in-trade' was therefore untenable. (pp 503 h-i & 504 b)

[3] The special commissioners had erred when holding that the subject lots were purchased for development. There was no evidence adduced as to the original intention at the time of purchase in 1975. The applications for development were made in 1981 after the government had issued a notice to acquire the land. These very applications, therefore, could not establish intention in 1975 when the subject lots were purchased. (pp 505 h-i & 506 b-c)

[3a] The special commissioners failed to give probative value to the following facts, namely (i) the subject lots were classified under fixed assets, not stock-in-trade (ii) the subject lots were not contagious to other land under development; (iii) the subject lots were purchased in 1975 and

acquisition took place in 1997 and in between no development on the land was ever done; and (iv) the appellant had no developer's licence and was not a dealer in land. The special commissioners had also failed to give due weight to the conduct of the appellant in capitalising the subject lots and in not proceeding with sub-division of the subject lots. The conduct of the appellant showed that there was no intention to develop the same subject lots. (pp 506 d-i, 507 a-b & 508 d-g)

[4] The learned special commissioners had erred when they concluded that "the asset when acquired by the government was still stock-in-trade and the nature of the assets remains the same and is not vitiated by the said acquisition". The subject lots were disposed of not in the ordinary course of business since this is an acquisition. There was no evidence that the subject lots were purchased in 1975 for the business of the appellants. (p 509 c-g)

[5] The learned special commissioners had erred when they held that the development expenditure in the appellant's accounts referred to the subject lots. This was a serious error of fact or inferences from facts by the special commissioners. The evidence showed that there was no fact found that the development expenditure related to the subject lots. Such unsupported inference constituted a material misdirection on the part of the learned special commissioners. (p 510 d-h)

[6] The learned special commissioners had erred in law in giving great significance to applications for development. Likewise, they also erred in law in finding that approval for development had been given when in fact there was no document to support their finding or inference. The case of *Cunliffe v. Goodman* has clearly laid out the principle that "applications are not conclusive of intention but only reflective of a proposal". (p 511 f-g)

[7] The learned special commissioners had also erred when they concluded that the correct year of assessment was 1996 and not 1998. The acquisition was only completed on 10 June 1997 when Form K was issued under s. 22 Land Acquisition Act 1960. It follows that the relevant period was 1997 and therefore the year of assessment should be 1998. (p 515 a-f)

[Appeal allowed.]

Case(s) referred to:

American Leaf Blending Co Sdn Bhd v. Director General of Inland Revenue [1979] 1 MLJ 1 ***(not foll)***

Chu Lip Kong v. Director-General of Inland Revenue [1982] CLJ 398; [1982] CLJ (Rep) 1 ***(refd)***

Consolidated Goldfield plc v. Inland Revenue Commissioners [1990] STC 357 ***(refd)***

Cunliffe v. Goodman [1950] 2 KB 237 ***(foll)***

Duple Motor Bodies Ltd v. Commissioners of Inland Revenue 39 TC 537 ***(refd)***

Gallagher v. Jones [1993] STC 537 ***(refd)***

Gnanasegaran Perarajasingam v. PP [1997] 4 CLJ 6 ***(refd)***

Hudson's Bay Co Ltd v. Steven [1909] 5 TC 424 ***(refd)***

International Investments Ltd v. Comptroller of Inland Revenue [1975] 2 MLJ 208 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***

Johnston v. Britannia Airways [1994] STC 763 ***(refd)***

Kirkham v. Williams (Inspector of Taxes) [1911] STC 3412 ***(foll)***

Kirkham v. Williams [1991] STC 342 ***(refd)***

Lim Foo Yong Sdn Bhd v. Comptroller General of Inland Revenue [1986] 2 MLJ 161 ***(refd)***

Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 ***(foll)***

National Land Finance v. Ketua Pengarah [1993] 4 CLJ 339 ***(refd)***

Odeon Associated Theatres v. Jones [1972] 2 WR 331 ***(refd)***

Penang Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Appeal No. R1-14-10-95) (unreported) ***(refd)***

Reed v. Nora Securities Ltd [1985] 1 All ER 686 ***(refd)***

Rolfe v. Wimpey Waste Management Ltd [1989] STC 454 ***(refd)***

Ruhamah Property Co Ltd v. Federal Commissioners of Taxation [1928] 41 CLR 148 ***(refd)***

Simmons v. IRC [1980] 1 WLR 1196 ***(refd)***

Sincere Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2000] 4 CLJ 334 ***(refd)***

Legislation referred to:

Income Tax Act 1967, ss. 3, 24(1)(a), 29, sch 5 para 40

Land Acquisition Act 1960, s. 22

Other source(s) referred to:

Halsbury's Law of England, 3rd edn, vol 20, p 691, para 1364

For the applicant - Dr A Subramaniam; M/s Geraldine Yeoh Arjunan & Assocs

For the respondent - Ahmad Khairuddin Abdullah (Lizellyna); Income Tax Dept

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

There is one issue in the instant case. It is whether the gains from the acquisition by the government of the subjects lots (lots 4740, 291321, 29133) in 1997 are subject to income tax. The subject lots were acquired in 1997 by government by way of an acquisition and, therefore, if the gain is subject to tax the year of assessment should be year of assessment 1998 and not year of assessment 1996. The facts are as follows: The subject lots were purchased in 1975. In 1980, the subject lots were capitalised in the accounts at RM3,500,000. There was no sub-division of the subject lands. The government gave notice of the acquisition of the subject lots on 12 October 1981 (p. 16, 17 and 18 of exh. D). The notification was later withdrawn. On 5 October 1995, the government again gave notification to acquire the subject lots (p. 20 of exh. D). Evidence discloses that the government acquired part only of lots 29131 and 4740 and the whole of lot 29133. The written award for acquisition of the said lots was dated 15 December 1995 (p. 19 of exh. D). The appellant received the compensation sum of RM2,084,448.60 on 13 April 1996 (exh. P1). The official notification of the acquisition of the subject lots (on borang K) was issued by the Pemungut Hasil Tanah on 10 June 1997 (p. 21 of exh. D). The principal business of the appellant is to construct houses and sell. On 16 November 1982 the appellant submitted plans to the Majlis Perbandaran Ipoh for a proposed project to build flats and a residential and commercial complex on the subject lots (p. 3 of exh. F). Another plan for the proposed complex was submitted to the Majlis Perbandaran Ipoh on 22 July 1985 (p. 5 of exh. F). On 25 October 1989 the appellant's architect submitted to the appellant a revised budget estimate of the proposed complex (p. 267 of exh. D). In the appellant's annual accounts for 1981 to 1995, the subject lots were capitalised in the accounts at RM3,500,000. There was no sub-division of the lands. The appellant had no developer's licence in respect of the subject land. The appellant is not a dealer in land. The appellant is not a trader in buildings or selling hotels.

The grounds of appeal are:

> Ground One:
>
> The learned Special Commissioners erred in law when they held that the subject lots were stock in trade of the appellant

'Stock-in-trade' in relation to a business, means property of any description, whether movable or immovable, being either:

(a) Property such as is sold in the ordinary course of the business or would be sold if it were mature or if its manufacture, preparation or construction were complete; or

(b) Materials such as are used in the manufacture, preparation or construction of any such property as is referred to in para. (a) of this definition, and includes any work in progress.

The first point to make is that is a case of acquisition and, therefore, the disposal of the subject land cannot be held as disposed in the ordinary course of business. The special commissioners conclusion at p. 44 case stated that the "subject land satisfied the definition of stock-in-trade", is therefore, untenable. It is also a finding of fact that the appellant is not a trader in land. This finding of fact conflicts with the special commissioner's conclusion. (Item 20 facts proved para. 6.2 p. 7 (case stated)). In *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540, the above definition of trading stock was considered. In that case land purchased with the primary objective of building houses and selling to members of the Society was sold to a developer. Edgar Joseph Jr SCJ held:

> The Special Commissioners had held that the land was held as stock-in-trade because the taxpayer was trading. True it is that the taxpayer had been trading then the asset would be stock-in-trade and its sale or realisation at a profit would yield proceeds of an income nature liable to be brought into the computation of income tax. But if, on the other hand, the taxpayer had not been trading, then the asset would have been of a capital nature and its sale or realisation at a profit, would have been a capital gain not liable to be brought into the computation of income tax.
>
> It follows that whether or not the lots disposed of by the taxpayer to the developer were stock-in-trade depends on whether it can be established that the taxpayer was, at the material time, trading or been engaged in an adventure in the nature of trade. That is the key question.

The appellant in this instant case could not be said to be trading in the subject lots at the material time because it is a case of compulsory acquisition.

Edgar Joseph Jr SCJ after considering several cases concluded thus:

> Accordingly, it would be convenient if at this stage we turned to consider the next of the taxpayer's grounds of appeals which are closely linked to the present ground and which revolves around the question whether in entering into the transaction with the developer the taxpayer was forced to do so with the result that this negatived any intention to trade or to engage in an adventure in the nature of trade.

I am of the view therefore that the government acquisition of the subject lots in this case negatived any intention to trade. Edgar Joseph Jr SCJ concluded that the circumstances leading to sale must be examined to establish motive. He held:

> The circumstances necessitating the realisation of an asset may be of prime importance as it may afford an explanation for the realisation that negative the idea that any plan of dealing motivated the original purchase.

In the instant case the acquisition by the government is not a sale nor a commercial transaction. Therefore, it lends weight to the idea that any plan of dealing did not motivate the original purchase. There is also a material error of fact or inferences from facts in the case stated. The learned special commissioners under facts proved held in item 13 p. 6 case stated as follows:

> Approval was given for conversion of the subject lots to be developed and build flats and apartments (p. 12 of exh. F).
>
> (Item 13 - Facts Proved paragraph 6.2 page 6, (Case Stated))

Right at the outset it must be stated that the above finding is not a fact but an inference from p. 12 of exh. F. Page 12 of exh. F is a letter of the appellant's accountant to the respondent stating that approval was obtained but this letter was contradicted by the appellant's witness, Mr Yow Thin Chin, to the effect that no such approval was ever given.

The appellant's witness has also filed an affidavit to attest to the fact that no approval was given by the relevant authorities. Before taking up this issue further the role of the special commissioners in relation to facts and inferences from facts and conclusions of law drawn from facts must be stated. In *Chu Lip Kong v. Director-General of Inland Revenue* [1982] CLJ 398; [1982] CLJ (Rep) 1 the position is stated as follows:

> Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".
>
> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequence of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they

> can be shown to have proceed upon some erroneous assumption as to the relevant law. It is therefore, desirable that in Case Stated the Special Commissioners should set out in a separate paragraph from that which contains their findings of primary facts such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the Court may be able to identify the true nature of the inferences: *viz.* – whether they are pure inferences of facts or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

At p. 399 (p. 3) of the report, the Privy Council drew attention to facts which are in fact conclusions of law thus:

> Finally and most importantly, for this is the whole basis on which the Special Commissioners held that the profit made by the taxpayer, in the purchase and sale of the land was a profit from his trade as a timber merchant, is their statement that the taxpayer "on October 25 1966, did, in fact, sell the timber obtaining in the said land to Kim Hong & Company Ltd.". This statement although as a statement of pure fact embodies also a conclusion of law. Whether what persons write or say or do has the effect of transferring real or personal property from one person to another by way of sale is a question of law. Either the statement means that the primary facts as agreed by the parties or found by the Commissioners to be proven had effect in law as a sale by the taxpayer of the standing timber on the land to the timber company; in which case it is plainly wrong in law; or else it is a conclusion of mixed facts and law that no reasonable Special Commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffes in *Edwards v. Bairstow*. It is a conclusion or decision of the Special Commissioners which the High Court was entitled to and ought to have set aside.

In view of the above principles stated in *Chu Lip Kong (supra)*, item 13 at p. 6 of case stated is unsupported by any document of approval from the relevant authorities. As such item 13 p. 6 case stated is:

(a) either an error of fact on the face of the case or;

(b) an inference from the letter at p. 12 exh. F and, being unsupported by any actual approval from the relevant authorities is an error of law on the part of the learned special commissioners.

The learned special commissioners at p. 32 of the case stated concluded thus:

> Evidence indicates that the subject lots were purchased for development. The original intention was to build flats and apartments for sale.

I think there is no evidence adduced to the original intention at the time of purchase in 1975. The special commissioners' comments support this:

> The Appellant did not and was not able to produce the accounts for the years 1975 and 1980. The accounts for those years, perhaps, could have revealed the actual intention for the purchase of the subject lots at about the time the Chemor Park project was nearing completion in 1975.

Thus, in 1975 the original intention was not ascertained as for development. This tallies with the fact that in 1980 the subject lots were capitalised. The appellant agrees with the learned special commissioners that intention must be shown to have existed at the time of the purchase of the subject lots and the appellant must be judged against the background of its acts and conduct and the circumstances of the case (at p. 34 of case stated). The applications for development were made in 1981 after the government issued a notice to acquire the land. Therefore, this application cannot establish intention in 1975 when the land was purchased. The learned special commissioners erred in law that the subject lots were stock-in-trade. This conclusion is in direct contradiction to the following facts which establish the conduct of the appellant:

(a) the subject lots were not contiguous to the land which were for development;

(b) it is a fact found by the learned special commissioners that the subject lots which were bought in 1975 were capitalised in 1980. Item 17 under facts proved reads as follows:

> In the Appellant's Annual Accounts for 1981 to 1995, the subject lots were classified under fixed assets and not under trading stock. In 1980 the subject lots were capitalised in the accounts at RM3,500,000.
>
> (Item 17 - Facts Proved paragraph 6.2 page 7, (Case Stated)).

Trading stock cannot be capitalised. Since the subject lots were capitalised in the accounts in 1980, the conduct of the appellant needs special attention because conduct can establish intention. To support the appellant's argument that the intention was not to trade in the land the case of *International Investments Ltd v. Comptroller of Inland Revenue* [1975] 2 MLJ 208 is relevant. In this case land and building thereon were described as "work in progress". In this case the special commissioners took the view that the description and classification of the property by the auditors in the balance sheet was deliberate and could not have been a mistake (see para. H p. 211 of report).

In the instant case two facts must be given due weight:

(a) The subject lots were classified under fixed assets – not stock in trade

(b) The subject lots were capitalised in 1980.

Can these transactions in (a) and (b) above in respect of the subject lots be mistakes? It is patently clear that the appellant's actions in respect of the subject land were deliberate and the appellant's conduct shows clearly that the subject lots were not trading stock. The learned special commissioners failed to evaluate the probative value of the capitalisation of the subject land in 1980. First, it must be remembered that the capitalisation took place before the government issued a notice to acquire the land in 1981. This means the appellant's intention was clear even before 1981 and was not an act prompted by the government's intention of acquisition.

Second, the learned special commissioners quotations of cases on accountancy evidence needs to be up-dated with the following qualifications from recent cases:

(a) "Where accounts were prepared in accordance with accepted principles of commercial accountancy the court would be slow to accept that they were not adequate for tax purposes as a true statement of the taxpayer's profits for the relevant period. In particular, it would be slow to find that there was judge-made rule of law which prevented accounts prepared in accordance with the ordinary principles of commercial accountancy from complying with the requirements of the tax legislation."

(See *Johnston v. Britannia Airways* [1994] STC 763).

(b) See also *Gallagher v. Jones* [1993] STC 537 where it was held:

> No judge-made rule could override the application of a generally accepted rule of commercial accountancy.

It follows from the decision in *Britannia Airways (supra)* and *Gallagher v. Jones (supra)* that accountancy evidence not in conflict with statute law is relevant.

What constitutes "trading stock"? This subject is comprehensively covered in the *Lower Perak Co-operative Housing Society Bhd v. KP* [1994] 3 CLJ 540 of the report, Edgar Joseph Jr SCJ cited *Reed v. Nora Securities Ltd* [1985] 1 All ER 686; [1985] 1 WLR 193; [1985] STC 124, where Lord Templeman held:

> If a company is to acquire an asset as trading stock, the asset must not only be of a kind which is sold in the ordinary course of the company's trade but must also be acquired for the purposes of that trade with a view to a resale at a profit.

In the instant case it is admitted by the learned special commissioners the original intention in 1975 could not be established because for years 1975 to 1980 the accounts were not available and the special commissioners concluded

at para. 5 p. 28 of the case stated that "the accounts for those years, perhaps could have revealed the actual intention for the purchase of the subject lots." But in 1980 the accounts clearly show that the subject lots were capitalised. The accounts, therefore do show intention not to trade in the subject lots. In *Rolfe v. Wimpey Waste Management Ltd* [1989] STC 454 it was stated:

> It is not in doubt that land can be circulating capital or a current asset. The obvious instance and indeed the only instance given to us in the course of the argument, is land acquired in the course of business by a property dealer or speculative builder. The land is acquired to be turned into account by building on it and reselling it with the building on it. That apart, however, the general view of the authorities is that expenditure to acquire an interest in land is *prima facie* capital expenditure ...

Since the land were capitalised in 1980, the purchase in 1975 can be inferred *prima facie* capital expenditure. It is obvious that the following facts proved are in favour that the subject lots never formed part of the trading stock of the appellant:

(i) The subject lots were bought in 1975 and acquisition took place in 1997 and in between no development on the land was ever done. The subject lots were not contiguous to other land under development.

(ii) The subject lots were capitalised in 1980. Therefore, the appellant did not treat the subject lots as stock-in-trade. Trading stock can never be capitalised.

(Item 17 - Facts proved para. 6.2 p. 7, (case stated)).

(iii) There was no sub-division land.

(Item 18 - Facts proved para. 6.2 p. 7, (case stated)).

(iv) The appellant had no developer's licence in respect of the subject land.

(Item 19 - Facts proved para. 6.2 p. 7, (case stated)).

(v) The appellant is not a dealer in land.

(Item 20 - Facts proved para. 6.2 p. 7, (case stated)).

The subject lots were capitalised, and, therefore the dominant purpose could not be to trade in land. Further, there are cases where even sub-division of land does not mean the land becomes trading stock. (See *Hudson's Bay Co Ltd v. Steven* [1909] 5 TC 424, at *Lower Perak (supra)* report). Thus, in the instant case the subject lots were capitalised in 1980, the appellant had no history of trading in land, there is no developer's licence in respect of the said land, there was no development on the said land, and the government's

acquisition is a forced event and thus cannot on the authority of *Lower Perak (supra)* "constitute a sale the proceeds of which are subject to tax because the element of compulsion vitiates the intention to trade." (See *Lower Perak* report). The learned special commissioners, thus misdirected themselves. (See also the case of *Penang Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* Appeal No. R1-14-10-95 which upon comparable facts applied the principle in *Lower Perak (supra)).*

Ground Two:

> The learned Special Commissioners erred in law when they held "that the asset ... acquired by the Government was still stock-in-trade and the nature of the asset remains the same and is not vitiated by the said acquisition".

This conclusion of the learned special commissioners is against the principle in the Supreme Court case of *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540. Edgar Joseph, Jr SCJ also held that the proposition advanced on behalf of the Revenue that the sale of trading stock in difficult or hard-pressed situations does not change the character of trading stock or trading activities assist the revenue thus:

> Nor, for that matter, does the proposition advanced on behalf of the Revenue that the sale off trading stock in difficult or hard-pressed situations does not change the character of trading stock or trading activities, assist the Revenue because in the present case, what is also in dispute is whether the subject matter of the disposal by the taxpayer to the developer, to wit, the lots concerned were trading stock and also whether the taxpayer was at the material time, engaged in trading activities which could be described as an adventure in the nature of trade.

Therefore, the learned special commissioners erred in law when they held:

> We are of the considered view that the asset when acquired by the Government was still stock-in-trade and the nature of the asset remains the same and is not vitiated by the said acquisition.

The subject lots were disposed not in the ordinary course of business, since this is an acquisition. And there is no evidence that the subject lots were purchased in 1975 for the business of the appellants. The capitalisation of the assets in 1980 supports that submission. The learned special commissioners are bound by the then Supreme Court's decision.

Ground Three:

> The learned Special Commissioners erred in law when they held the development expenditure in the accounts referred to the subject lots acquired by the Government, when it did not.

There is another serious error of fact or inferences from fact by the learned special commissioners at p. 29 of the case stated, as follows:

> Although the subject lots were reflected as Fixed Assets in the Annual Audited Accounts from 1981 onwards, quite surprisingly the expenses incurred on the subject lots were classified as "Land and Development Expenditure" under Current Assets. It is pertinent to mention here that only development expenditures in respect of current assets quality for deductions.

It is noted that under facts proved, pp. 5-7 of the case stated, there is no fact found that the development expenditure related to the subject lots. Item 15, p. 7 of the case stated reads as follows:

> In the Appellant Annual Accounts for 1981 to 1995 "Land and Development Expenditure" has been reflected and the amount increased year by year.
>
> (Item 15 - Facts Proved paragraph 6.2 page 7, (Case Stated)).

Page 27 of case stated where the development expenditures are outlined is not under facts proved. But the appellant's witness categorically stated that these expenditures did not relate to the subjects lots. (His affidavit has reference). The conclusion at p. 29 of the case stated can, therefore, at best be an inference from the fact there were development expenditures in the accounts. The inference that the development expenditure referred to the subject lots is a material misdirection on the part of the learned special commissioners. That this is misdirection is supported by the following facts found:

(a) Item 18 of facts found states that "There was no sub-division of the subject land";

(b) Item 9 of the facts proved states that "the appellant had no developer's licence in respect of the subject land."

(c) Item 17 of the facts proved states that:

> In the Appellant's Annual Accounts for 1981 to 1995, the subject lots were classified under fixed assets and not under trading stock. In 1980 the subject lots were capitalised in the accounts at RM3,500,000.

Further to the above the witness specifically stated in clear terms that the development expenditures in the relevant accounts did not relate to the subject lots. Thus, the witness filed an affidavit to this effect. This point is material to the appeal and the court, if not satisfied as to whether the development expenditures referred to the subject lots, should order the case to be remitted back to the special commissioners to call back the witness to establish whether the development expenditures referred to the subject lots. The power to do this is in para. 40 sch. 5 Income Tax Act 1967 which reads as follows:

At any time before it determines the questions of law arising on a case stated under paragraph 34, the High Court may:

(a) cause the case to be sent back to the Special Commissioners for amendment;

(b) require the Special Commissioners to find further facts and state a supplementary case;

In interpreting tax statutes, if the words of a taxing statute are indefinite and uncertain and can be interpreted in two ways, the rule is that the one more favourable to the taxpayer ought to be adopted. Applying the same principle to the accounts, it can be said that the learned special commissioners should not have inferred that the "development expenditures" referred to the subject lots. This is even more serious in view of the evidence given by the appellant's witness to the effect that the said expenditures did not refer to the subject lots.

Ground Four:

(1) The learned Special Commissioners erred in fact or inferences from a fact when they held that approvals for development on the subject lots were approved by the relevant authorities, since there is no evidence of any approval letter from the relevant approving authority. Appellant's witness clearly stated that there was no approval from the authorities.

(2) The learned Commissioners failed to address the meaning of "intention" in law as outlined in *Cunliffe v. Goodman (infra)*(cited in *Lower Perak* case *(supra))*.

The learned special commissioners erred in law in giving great significance to applications for development, and also erred in law in finding approval for development has been given when in fact there is no document to support their finding or inference. In respect of application for development, the law is as follows:

(a) Applications are not conclusive of intention but only reflective of a proposal.

(See *Cunliffe v. Goodman* [1950] 1 All ER 720).

(b) Intention in law is of a different concept. It does not refer to "application". In *Cunliffe v. Goodman* [1950] 2 KB 237; [1950] 1 All ER 720, the position is stated thus:

An 'intention' to my mind connotes a state of affairs which the party 'intending' – I will call him X – does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him

> lies, to bring a bout, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.
>
> X cannot .... 'intend' as a result which is wholly beyond the control of his will.

And at p. 254 para. 2 and 3 his Lordship added this:

> This leads me to the second point bearing on the existence in this case if 'intention' as opposed to mere contemplation. Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile.
>
> A purpose so qualified and suspended does not in my view amount to an 'intention' or 'decision' within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.

In the instant case, "Neither the project moved out of the zone of contemplation – out of the sphere of the exploratory – into the valley of decision" (as per Lord Azquith in *Cunliffe v. Goodman (supra)*). The learned special commissioners failed to address the principles in *Cunliffe (supra)*. It follows that the learned special commissioners made an error in law. The appellant's witness gave reasons why the 'applications' were made in 1982. It was to enhance the value of the properties in view of the government's intention of acquisition on 12 October 1981. This reason was entirely ignored by the learned special commissioners.

Ground Five:

The learned Special Commissioners having said that the original intention of purchase in 1975 was clear cannot then find the application to develop the land in 1982 to mean that the subject lots were trading stock for no approvals were in fact granted and thus that objective (which was undertaken to enhance the value of the subject lots in view of the notice of Government's intention to acquire the land in 1981) was severely circumscribed and its implementation indefinite in point of time. It is an error of law to then find the subject lots trading stock (*Kirkham v. Williams* [1991] STC 342).

The facts in *Kirkham v. Williams (supra)* are as follows:

> The taxpayer worked on his own account as a general dealer, demolition contractor and hirer of plant. In May 1977 he purchased a ten-acre site including a mill. In October 1977, after he had acquired the site, he applied

for planning permission to erect an agricultural worker's dwelling. That application was refused. Planning permission was granted in 1980 for the erection of a dwelling house, which the taxpayer built himself. He sold the whole site and house in October 1982 and moved to a farm. The commissioners found that the taxpayer did not terminate his business as a general dealer and demolition contractor when he moved to his new premises. The gain on the sale was assessed under Sch. D, Case I for the year 1982-1983 as a trading profit within s. 109 of the Income and Corporation Taxes Act 1970.

It was held:

(1) The true and only reasonable conclusion from the facts found was that the site had been acquired by the taxpayer as a capital asset and it was not therefore open to the commissioners to determine that the purchase, development and sale of the site by the taxpayer was an adventure in the nature of trade.

(2) Per Nourse LJ. The taxpayer's acquisition of the site viewed on it own was an equivocal transaction, as one could not determine whether the property was acquired as trading stock or as a capital asset. Therefore account had to be taken of its purpose. The commissioners' express finding as to the principal purpose characterised the transaction as the acquisition of a capital asset. It could properly be inferred from the commissioners' primary findings of fact the subsidiary purpose have been the development and sale of the site. However, this subsidiary purpose was severely circumscribed and its implementation indefinite in point of time. Accordingly, it was not open to the commissioners, having made a finding which characterised the transaction as an acquisition of a capital asset, to deny it that character by reason of an intention thus circumscribed and indefinite.

(3) Per Llyod LJ. The commissioners had not made an express finding that the taxpayer's subsidiary purpose in acquiring the site was a trading purpose. Accordingly, it was not open to the draw an inference that the commissioners might have found that the taxpayer's subsidiary purpose was a trading purpose in order to support the commissioners' conclusion. The commissioners' only other finding in relation to the taxpayer's purposes in acquiring the site was that he intended to carry on limited farming. The taxpayer's acquisition of the site was therefore not an equivocal transaction since neither of the two purposes found by the commissioners was a trading purpose. It was clear that they must have held that the gain on the sale of the site was assessable as a trading profit because of a subsequent change of intention on the part of the taxpayer. However, there was no evidence to support the view that such a change had occurred, and the commissioners had therefore erred in law.

In the instant case the original intention was held by the learned special commissioners as not discernable for they held:

(1) The appellant purchased the subject lots in 1975 pursuant to a directors' resolution dated 21 June 1975. The resolution does not state whether the subject lots to be acquired was for investment or for development and sale or as stock-in-trade. (Item 2 – trading stock or investment p. 26, (case stated)).

(2) The appellant did not and was not able to produce the accounts for the years 1975 to 1980. The accounts for those years, perhaps, could have revealed the actual intention for the purchase of the subject lots at about the time the Chemor Park project was nearing completion in 1975.

(Item 5 – Trading stock or investment p. 28, (case stated)).

(3) Though two of the directors from the inception of the appellant are still around, none was called to give evidence to establish the original intention in respect of the purchase of the subject lots.

(Page 32, case stated).

(4) The resolution of the board of directors passed on 21 June 1975 to purchase the subject lots does not specify the purpose of the acquisition (p. 13 of exh. D).

(Item 14 – Facts proved para. 6.2 p. 7, (case stated)).

In his affidavit the appellant's witness explained to the learned special commissioners why these witnesses were not called. The witness's explanation as to the application to develop in 1982, to wit, to enhance the value of the subject lots in view of government's notice in 1981 to acquire the land and the fact that no approval were in fact given by the relevant approving authority, and the fact that the government acquired the subject lots in 1997 meant only one thing: The principle in *Kirkham v. Williams (supra)* applies, the subject lots could not be stock-in-trade. Thus the learned special commissioners' conclusion that the acquisition by the government gives rise to a trading profit is unsustainable, for there is a finding of fact that the land was capitalised in 1980, and there was no evidence of actual intention in 1975. The intended objective (which arose because of government's notice of acquisition in 1981) was severely circumscribed and its implementation indefinite in point of time (since no approvals were ever given). It is observed that it is a fact found that on 5 October 1995 the government again gave notice to acquire the land (item 5 facts proved p. 5 case stated). It follows that the appellant's witness is right – no approvals were given. In fact the learned special commissioners did not cite any document of approval from the relevant authorities.

Ground Six:

The learned Special Commissioners erred in law when they held that the assessment year 1996 is correct and not year of assessment 1998. It is submitted that the acquisition was complete only on 10 June 1997 ie, Form K was issued under s. 22 of the Land Acquisition Act, and therefore, the year of assessment should be Year of Assessment 1998.

At any rate the reasons given by the special commissioners are errors in law which are as follows: The learned special commissioners cited s. 24(1)(a), Income Tax Act 1967 (at p. 23, case stated). Section 24(1)(a) reads as follows:

> (Debt owing) Where in relevant period a debt owing to the relevant person arises in respect of:
>
> (a) any stock in trade sold (or parted with on requisition or compulsory acquisition or in similar manner) in or before the relevant period in the course of carrying on a business;
>
> (b) any services rendered at any time in the course of carrying on a business; or
>
> (c) the use or enjoyment of any property dealt with at any time in the course of carrying on a business.

the amount of the debt shall be treated as gross income of the relevant person from the business for the relevant period. The key words are relevant period. Form K, the only final authority for acquisition by government occurred in 10 June 1997. It follows that the relevant period is 1997, since it is Form K which gives rise to the debt. The learned special commissioners, therefore, erred in law. The learned special commissioners also cited s. 29 Income Tax Act 1967. Section 29 reads as follows:

> (1) **(Persons entitled to receipt on demand)** Notwithstanding anything in ss. 23 to 28 where the circumstances are such that the relevant person is entitled to any gross income (other than gross income to which s. 24 or 26 applies) accruing in or derived from Malaysia and is able to obtain the receipt thereof on demand, that gross income shall be treated as being received by him at the time those circumstances arise.
>
> (2) **(Income receivable by receiver)** The reference in sub-s. (1) to gross income of which the relevant person is able to obtain on demand includes a reference to gross income the receipt of which he would be able to obtain on demand but for the fact that it is lawfully receivable by a receiver of any kind.

The learned special commissioners quote passages from the Malaysian Tax Reporter, vol. 1. I think the appellant in this case is only entitled to

compensation for which a legal demand could be made upon acquisition by the government. The date of the acquisition is 10 June 1997. This date cannot be ignored. And, therefore, the learned special commissioners made an error in law that the year of assessment is 1997 when in fact the assessment should be 1998. It is noted that the passages quoted from the Malaysian Reporter, Vol. 1 by the learned special commissioners address the question of income derived when the relevant circumstance arise, and that means the date of acquisition which is 10 June 1997. Also, the basis of taxation under s. 3, Income Tax Act 1967 is a derived basis and not a cash basis. This means the date of payment is irrelevant. Even if the payment is not made, the sums are due on 10 June 1997.

There is no evidence that the subject lots were purchased for business purposes of the appellant. The memorandum of association (p. 2 of exh. D) is not conclusive. See *Ruhamah Property Co Ltd v. Federal Commissioners of Taxation* [1928] 41 CLR 148 where it is held:

> In our opinion the authorities show that the objects and powers of the Company contained in its memorandum and articles of association are not decisive of the question whether the sale was an operation of business in carrying out a scheme of profit-making, but that a consideration of all the matters advanced by the Company was relevant to a determination of that question. (cited in *E v. Comptroller General of Inland Revenue* [1970] 2 MLJ 117).

It is observed that the application for development was explained as to enhance the value of the subject lots in view of government acquisition, which first happened on 12 October 1981, and to give a better compensation. At any rate no approvals were ever given. The development expenditure in the accounts from 1981-1995 did not relate to the subject lots. There is no evidence to this effect. Any conclusion to that effect is only an inference and cannot be sustained in law. Note that on p. 117 of exh. D appellant's bundle of documents, the subject lots are under fixed assets at RM3,500,000. This is after capitalisation of the subject lots. There is no development expenditure. There is no onus on the appellant to prove the negative. There is no evidence of the relevant authorities approval in this case. See also *Gnanasegaran a/l Perarajasingam v. Public Prosecutor* [1997] 4 CLJ 6, where it is stated:

> My first response to this is that the prosecution cannot be expected to prove negative.

See also *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86 at p. 87 where it is held that the burden of proof constantly shifts. The respondent has an evidential burden to prove what he asserts. In *International Times* it is stated as follows:

> The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any further evidence or gives evidence which is not sufficient, such party must fail.

If the respondent in this case asserts that the development expenditure referred to the subject lots there is an evidential burden on the respondent to prove so. This was not done. The learned special commissioners have shown no basis to come to such a conclusion. There is also no approval letter from the authorities for any development. Therefore, there is an error of law. The applications were not made in 1975 but after the government took steps to acquire the subject lots in 1981. Therefore there was no intention in 1975 to build etc. A company can hold property as investment and not stock in trade. The appellant did not put its assets to any gainful use since the subject lots were subject to an acquisition by government. In the instant case the assets were classified as fixed assets. And the assets were capitalised in 1980. Trading stock cannot be capitalised. This clearly shows the intention of the appellant that the subject lots were not trading stock. Capitalisation of the subject lots is a deliberate act and it supports the appellant's case and that the subject lots were not trading stock. The appellant's affidavits do not disclose fresh evidence. They disclose material evidence given, which the learned special commissioners ignored. Where evidence material to the appellant's case is left to an inference the case should be remitted to the special commissioners. The authority for this proposition is in *Consolidated Goldfield plc v. Inland Revenue Commissioners* [1990] STC 357 (approved in the Malaysian Court of Appeal case of *Sincere Leasing Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2000] 4 CLJ 334) where the following principles were held:

> (i) The findings of fact are for the commissioners. They cannot be instructed to find facts nor as to the manner in which they express their findings;
>
> (ii) The parties are entitled to expect that the commissioners will in the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal;
>
> (iii) If a request is made for a case stated to be remitted for additional findings to be made or to be considered the applicant must, in my opinion show that the desired findings are (a) material to some tenable argument, (b) at least reasonably open on the evidence that has been adduced and (c) not inconsistent with the finding or findings that have already been made.

In *Sincere Leasing Sdn Bhd (supra)*, affidavits were also filed in order to remit the case to the learned special commissioners. In *Chu Lip Kong v. Director General of Inland Revenue* [1982] CLJ 398; [1982] CLJ (Rep) 1 it was held:

> Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found that they should set out in the Case Stated as having been "admitted of proved".

In the instant case, the expenditure was inferred as relating to the subject lots. This is not a finding of primary fact. Further, in *Halsbury's Laws of England*, 3rd edn. vol. 20 para. 1364 at p. 691, it is clearly stated:

> There should be a definite finding, not an approval or contentions. Commissioners should be careful to say that they 'find' a conclusion of fact arrived at from other facts found; or if they do not mean to draw any conclusion of fact to apply the law they should indicate their conclusion by saying that they 'hold' it. The most convenient arrangement of a case stated is to set out the facts in a series of paragraphs, followed by separate paragraphs showing the contentions of the parties and the commissioners' findings respectively. The statement of law upon which the court's opinion is sought should be set out in the case. In cases where the commissioners have to deduce a conclusion of fact from primary facts admitted or proved before them, the question of law is whether the primary facts found or admitted can support the further conclusions of fact, and the point ought to be so stated.

Thus, in this case there are no primary facts found or admitted to prove that the development expenditures referred to the subject lots. In fact the appellant took great care in evidence as a witness to say categorically that the development expenditure did not refer to the subject lots.

Intention at the time of purchase is of paramount importance (see *Lim Foo Yong Sdn Bhd (supra)*). There is no clear fact finding that the original intention at the time of purchasing the subject lots in 1975 was for trading stock. The conduct of appellant in the years close to the purchase, therefore, is important. The subject lots were capitalised in 1980 and, therefore, the subject lots could not have been trading stock. The subject lots were not disposed of in the ordinary course of the appellant's business. The case of *Penang Realty* which applied *Lower Perak (supra)* should be followed. Where there is doubt, the case must also be ruled in favour of the taxpayer (*National Land Finance v. Ketua Pengarah* [1993] 4 CLJ 339). It is inconsistent on the part of the learned special commissioners to say that the conduct of the taxpayer is important and

yet ignore the accounting treatment accorded to the subject lots in 1980. Trading stock cannot be capitalised. The case of accounting treatment quoted by the special commissioners are general in nature. In *Odeon Associated Theatres v. Jones* [1972] 2 WR 331 Salmon, LJ said:

> Where, however, there is evidence which is accepted by the Court as establishing a sound commercial accounting practice conflicting with no statute that normally is the end of the matter. The Court adopts the practice, applies it and decides the case accordingly.

In *Duple Motor Bodies Ltd v. Commissioners of Inland Revenue* 39 TC 537 Lord Simonds expressed a similar idea without using the word "statute". His Lordship said:

> ... the ordinary principles of commercial accounting must as far as practicable be observed, and ... The law relating to income tax must not be violated ... .

In *Simmons v. IRC* [1980] 1 WLR 1196 it was held:

> Intentions may be changed. What was first an investment may be put into the trading stock – and, I suppose, *vice versa*. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve **changes in the company's accounts**. (emphasis added).

The very act of capitalising the subject lots showed that the subject lots were not treated as stock-in-trade. The learned special commissioners did not give due and adequate consideration to this fact and to other circumstances of the case, namely, the fact that the appellant was not a dealer in land, had no developer's licence, made no sub-divisions on the lots, and only applied for development in 1982 because the government's threat to acquire the lots in 1981. A company can hold trading stock and capital investment. And where capital investments were kept in separate accounts from trading stock, this is a strong demarcation line between the two. In *Lim Foo Yong Sdn Bhd v. Comptroller General of Inland Revenue* [1986] 2 MLJ 161, the Privy Council held:

> The Special Commissioner, with respect to them, appear to have assumed that, since the appellant's objects as appearing from its Memorandum enabled it both to hold investment and also to trade in land and shares, it followed inexorably, if it could be once demonstrated that it had acquired and sold land or shares at a profit, first, that the appellant had for all time and for all purposes to be labeled a company engaged in the business of dealing in property and secondly, that all property of the appellant, for whatever purpose held, necessarily constituted trading stock the profitable disposition of which gives rise to a trading profit.

Thus, in the instant case the learned special commissioners have assumed that since the appellant had other lands for development, the subject lots are also trading stock. But the fact of capitalisation in 1980, taken together with the fact of not being a trader in land, no licence to develop the land, and the threat of acquisition in 1981 lead to applications for development point in the direction that the subject lots were not held as trading stock. That accounting evidence may be used to demonstrate intention was recognised also in *Harvey v. Caucott* 33 TC 159. In that case accounting evidence was adduced to show that two properties sold were never part of trading stock by illustrating, that the said two properties were removed from the trading accounts and kept separately for twenty years past. Donovan, J accepted such evidence as a indication that the properties were investments and not trading stock. The learned special commissioners were inconsistent in the application of accountancy evidence in that when it came to when the compensation was derived they took the entry in the accounts as evidence but when it came to the capitalisation of assets in 1980, this fact found was totally ignored. The principle in *American Leaf Blending* [1979] 1 MLJ 1 PC quoted by the learned special commissioners can be rebutted. *Lim Foo Yong (supra)* is such a case. Where the circumstances of the disposal are inconsistent with trading the gains cannot be subject to income tax (*Lower Perak (supra)*). The case before me is such a case because the subject lots were acquired by the Government by way of acquisition and not by sale. *Lower Perak (supra)* is binding authority on the learned special commissioners and on this court as well. Where a succession of permits and licences must be obtained from the relevant town planning authority, unless such approvals have been obtained, an "intention" to trade cannot be inferred and the application can only be in the "contemplation stage" (*Cunliffe v. Goodman* [1950] 2 KB 237). In the instant case such approval was not obtained and, therefore, the inferences of the learned special commissioners are an error in law. Where in intention to develop property has become severely circumscribed and its implementation indefinite in point of time, it is open to the court to deny a sale of such property as trading stock by reasons of an intention, thus circumscribed and indefinite. (See *Kirkham v. Williams* [1991] STC 342). Thus, in the instant case the acquisition by the government put a stop to any intention or contemplation to develop. The subject lots cannot be trading stock.

For the reasons stated above, the appeal is allowed with costs.